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In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK PAUL GIUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court erred in finding that he consented to the search of his premises.

1. Following a jury trial in the United States District Court for the District of New Jersey, petitioner, together with his three co-defendants, was convicted of conspiracy to possess and possession of goods stolen from an interstate shipment, in violation of 18 U.S.C. 659 and 371. Petitioner was sentenced to concurrent five year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

On October 15, 1975, a tractor-trailer containing a million-dollar shipment of pharmaceuticals destined for Missouri was stolen at gunpoint from a truckyard in Pennsylvania and brought to petitioner's farm in Manalapan, New Jersey. On October 28, following an

investigation, this farm became the subject of F.B.I. surveillance. F.B.I. agents in a surveillance plane observed petitioner and his co-defendants loading cartons of drugs into a van from a shed on petitioner's farm. When petitioner spotted the plane, his co-defendants departed leaving the van on the farm (I Tr. 1.51-1.55, 1.68, 1.73-1.77; II Tr. 2.06-2.15, 2.29-2.34; IV Tr. 4.65, 4.71-4.80; I S.Tr. 11-12).[1]

At that point, several agents drove up to the farm and encountered petitioner standing under a tree scanning the sky with binoculars (S.Tr. 6). Agent Colitre, who was in charge, identified himself and informed petitioner that the agents wanted to conduct a search, but that they did not have a search warrant and would not conduct a search without petitioner's permission (I S.Tr. 7). The agents told petitioner that they had reason to believe that there was stolen property on the farm and that the agents wished to search for this property. Petitioner replied that they could go ahead and search the farm (I. S.Tr. 6-8). When the agents came to the shed, they asked petitioner for a key to a padlock on its doors. Petitioner replied that he rented the shed to someone else and did not have a key. When asked for the name of the renter, petitioner first said that he did not know his name and then said that he had rented the building on a monthly basis to a man named Martin, whose last name he did not know, that he had not seen him in several months, and that Martin paid his rent in cash. Petitioner could not describe the alleged renter (I S.Tr. 24). After the agents told petitioner that they found it hard to believe that he had rented the shed, petitioner responded "[w]ell it's all right

[1]"S.Tr" refers to the transcript of the hearing on the motion to suppress, and "Tr." refers to the trial transcript.

with me if you go ahead and look into the building" (I. S.Tr. 24-25). One agent then removed the lock and entered the shed (I. S.Tr. 25-26). The shed contained hundreds of cartons of the stolen drugs (I. S.Tr. 26).

Prior to trial, the search of petitioner's farm was the subject of a suppression motion and hearing. Petitioner denied that he had given the agents permission to conduct a search. He claimed that he had asked them if they had a warrant to look around, that they replied "no, we don't," and that they then proceeded to search the farm. He also testified that he had rented the shed to a Mr. Martin (II S.Tr. 62-71, 87-88). At the conclusion of the hearing, the district court, finding Agent Colitre's testimony to be truthful and petitioner's testimony "incredible," found that petitioner had consented to the search of his premises (II S.Tr. 177).

2. There is no merit to petitioner's contention that the district court erred in finding that he consented to the search of his shed. That finding is amply supported by the agents' testimony at the suppression hearing; the district court expressly credited that testimony and discredited that of petitioner.

Petitioner offers no reasons based on the record for disputing the district court's finding. He merely argues (Pet. 5-6) that the search was without a warrant and there were no exigent circumstances. But it has long been established that a warrantless search conducted pursuant to a valid consent is constitutionally permissible. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 424; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222.

The record also belies petitioner's claim (Pet. 6) that he merely acquiesced to lawful authority. Unlike the situation in *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner relies, the agent here gave petitioner a clear

choice when he told him that no search would be conducted if petitioner did not give his permission. It was proper for the district court, as the fact finder, to accept Agent Colitre's version of the facts while rejecting petitioner's version. This ruling was not clearly erroneous. See *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 926-927 (C.A. 3), certiorari denied, 420 U.S. 909.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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